

§ 390.340

12 CFR Ch. III (1–1–13 Edition)

sponsor's board of directors, but in no event shall it exceed the annual increase in the Consumer Price Index published by the Bureau of Labor Statistics; and

(2) No increase shall be granted unless:

(i) Anticipated charges to net income for future periods have first been found by such board of directors to be reasonable and are documented by appropriate resolution and supporting analysis; and

(ii) The increase will not reduce the State savings association's regulatory capital below its regulatory capital requirement.

(d) *Termination.* The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the FDIC at least 60 days prior to the proposed termination date.

(e) *Records.* Each State savings association maintaining a plan not subject to recordkeeping and reporting requirements of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1954, as amended, shall establish and maintain records containing the following:

(1) Plan description;

(2) Schedule of participants and beneficiaries;

(3) Schedule of participants and beneficiaries' rights and obligations;

(4) Plan's financial statements; and

(5) Except for defined contribution plans, an opinion signed by an enrolled actuary (as defined by the Employee Retirement Income Security Act of 1974) affirming that actuarial assumptions in the aggregate are reasonable, take into account the plan's experience and expectations, and represent the actuary's best estimate of the plan's projected experiences.

§ 390.340 Offers and sales of securities at an office of a State savings association.

(a) A State saving association may not offer or sell debt or equity securities issued by the State savings association or an affiliate of the State savings association at an office of the State savings association; except that equity securities issued by the State savings association or an affiliate in

connection with the State savings association's conversion from the mutual to stock form of organization in a conversion approved pursuant to 12 CFR part 192 may be offered and sold at the State savings association's offices: *Provided, That:*

(1) The FDIC does not object on supervisory grounds that the offer and sale of the securities at the offices of the State savings association;

(2) No commissions, bonuses, or comparable payments are paid to any employee of the State savings association or its affiliates or to any other person in connection with the sale of securities at an office of a State savings association; except that compensation and commissions consistent with industry norms may be paid to securities personnel of registered broker-dealers;

(3) No offers or sales are made by tellers or at the teller counter, or by comparable persons at comparable locations;

(4) Sales activity is conducted in a segregated or separately identifiable area of the State savings association's offices apart from the area accessible to the general public for the purposes of making or withdrawing deposits;

(5) Offers and sales are made only by regular, full-time employees of the State savings association or by securities personnel who are subject to supervision by a registered broker-dealer;

(6) An acknowledgment, in the form set forth in paragraph (c) of this section, is signed by any customer to whom the security is sold in the State savings association's offices prior to the sale of any such securities;

(7) A legend that the security is not a deposit or account and is not federally insured or guaranteed appears conspicuously on the security and in all offering documents and advertisements for the securities; the legend must state in bold or other prominent type at least as large as other textual type in the document that "This security is not a deposit or account and is not federally insured or guaranteed"; and

(8) The State savings association will be in compliance with its current capital requirements upon completion of the conversion stock offering.

(b) Securities sales practices, advertisements, and other sales literature

used in connection with offers and sales of securities by State savings associations shall be subject to § 390.419.

(c) Offers and sales of securities of a State savings association or its affiliates in any office of the State savings association must use a one-page, unambiguous, certification in substantially the following form:

FORM OF CERTIFICATION

I ACKNOWLEDGE THAT THIS SECURITY IS NOT A DEPOSIT OR ACCOUNT AND IS NOT FEDERALLY INSURED, AND IS NOT GUARANTEED BY *[insert name of State savings association]* OR BY THE FEDERAL GOVERNMENT.

If anyone asserts that this security is federally insured or guaranteed, or is as safe as an insured deposit, I should call the FDIC's appropriate regional director *[insert name and telephone number with area code of the appropriate regional director, as defined in section 303.2 of this chapter]*.

I further certify that, before purchasing the *[description of security being offered]* of *[name of issuer, name of State savings association and affiliation to issuer (if different)]*, I received an offering circular.

The offering circular that I received contains disclosure concerning the nature of the security being offered and describes the risks involved in the investment, including:

[List briefly the principal risks involved and cross reference certain specified pages of the offering circular where a more complete description of the risks is made.]

Signature: _____

Date: _____

(d) For purposes of this section, an "office" of a State savings association means any premises used by the State savings association that are identified to the public through advertising or signage using the State savings association's name, trade name, or logo.

§ 390.341 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital.

(a) *Scope.* A State savings association must comply with this section in order to include subordinated debt securities or mandatorily redeemable preferred stock ("covered securities") in supplementary capital (tier 2 capital) under subpart Z. If a State savings association does not include covered securities in supplementary capital, it is not required to comply with this section.

(b) *Application and notice procedures.*

(1) A State savings association must file an application or notice under §§ 390.103 through 390.110 seeking FDIC approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The State savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until the FDIC approves the application or does not object to the notice.

(2) A State savings association must also comply with the securities offering rules at subpart W by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that subpart.

(c) *Securities requirements.* To be included in supplementary capital, covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: "This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;"

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the State savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the State savings association's assets or the assets of any affiliate of the State savings association. For purposes of this subpart, the term *affiliate* means any person or company which controls, is controlled by, or is under common control with such State savings association.

(D) State that the security is not eligible collateral for a loan by the State savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h);

(F) For subordinated debt securities, state or refer to a document stating